

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

IN THE MATTER OF THE SEARCH OF

Information associated with Facebook user ID  
100007632607325 that is stored at premises  
controlled by Facebook

Case No. 2:16mj 67

**Filed Under Seal**

**AFFIDAVIT IN SUPPORT OF  
AN APPLICATION FOR A SEARCH WARRANT**

I, Special Agent Wilmer (Gene) Smithson III with the USDA Forest Service, being first  
duly sworn, hereby depose and state as follows:

**INTRODUCTION AND AGENT BACKGROUND**

1. I make this affidavit in support of an application for a search warrant for information associated with the Facebook user ID identified in the Application that is stored at premises owned, maintained, controlled, or operated by Facebook Inc. ("Facebook"), a social networking company headquartered in Menlo Park, California. This affidavit is made in support of an application for a search warrant under 18 U.S.C. §§ 2703(a), 2703(b)(1)(A) and 2703(c)(1)(A) to require Facebook to disclose to the government records and other information in its possession, pertaining to the subscriber or customer associated with the user ID.

2. I have been a sworn federal law enforcement agent for over fifteen years. I am currently assigned as Special Agent to the USDA Forest Service Law Enforcement and Investigations Division. My present post of duty is the Monongahela National Forest, Northern Judicial District of West Virginia. During my career as a federal law enforcement officer, I have attended the Federal Law Enforcement Training Center in Glynco, Georgia, both in the Basic

Police Training course and also the Drug Enforcement Administration's forty hour Title 21 Counter Narcotics training course where he received specialized training in the detection and eradication of marijuana, the execution of search warrants, and criminal investigations. I also attended a ten week Criminal Investigator's Training Program at the Federal Law Enforcement Training Center. I have been involved in the execution of numerous search and arrest warrants and various cases involving violations of controlled substance laws. I am responsible for conducting investigations assigned to him and oversight of all felony and serious misdemeanor cases investigated by the USDA Forest Service within my geographical area of responsibility.

3. The facts in this affidavit come from my personal observations, my training and experience, and information obtained from other witnesses. This affidavit is intended to show merely that there is sufficient probable cause for the requested warrant and does not necessarily set forth all of my knowledge about this matter.

4. Based on my training and experience and the facts as set forth in this affidavit, there is probable cause to believe that violations of 16 U.S.C. § 4306(a)(1) (Federal Cave Resources Protection; Prohibited Acts and Criminal Penalties) and 18 U.S.C. § 1361 (damage to federal property, a felony if the damage exceeds \$1,000) have been committed by Codey Foster and Dusten Gill. There is also probable cause to search the information described in the Search Warrant Application for evidence and fruits of these crimes.

#### **PROBABLE CAUSE**

5. Vandalism Reported to the Forest Service Inside Bowden Cave: On May 31, 2015, members of the Mon Grotto and Geo Corps visited Bowden Cave to clean up the cave. During this trip, the members observed vandalism to the cave in the form of spray painted

“graffiti”. The graffiti depicted two names and a date. The graffiti reads as follows: “3/16/15 Codey Foster” and “DUSTEN GILL”. The graffiti was photographed by a Mon Grotto member.

6. On May 31, 2015, a Forest Service geologist received an email from the Mon Grotto member of photographs that had been observed on the Facebook page of Codey FOSTER. The photographs depict Codey FOSTER and Dusten Ray GILL inside a Bowden Cave appearing to lick a hibernating bat. The post by Codey FOSTER took place on March 16, 2015 at 1:43pm according to the screen shot of his Facebook post. The graffiti observed in the Bowden Cave was “3/16/15 Codey Foster” and “DUSTEN GILL”.

7. Dusten Ray Gill also uses Facebook. His page includes a conversation exchange with 2 other persons as follows:

Dusten Ray Gill:	Bad ass time bro. Mar 16, 2015 at 1:44 pm.
[Other Person]:	Oh the things you do to make me soooo proud? Touching a bat with your tongue . . . ummm not so much lol. Mar 16, 2015 at 3:15 pm.
Dusten Ray Gill:	Lol it was soooooo worth it. Mar 16, 2015 at 5:04 pm.
[Other Person]:	Bet that was fun Lmao. Mar 16, 2015 at 7:48 pm.
Dusten Ray Gill:	Yes it was we both licked a bat haha. Mar 16, 2015 at 8:21 pm.

8. Bowden Cave Listed as a Significant Cave: In a decision memo dated September 19, 2002, Bowden Cave was designated as a significant cave as per the Federal Caves Resource Protection Act of 1988.

9. Agent Contacts WV Wildlife Biologist to Identify the Bats In the Photograph: The caves on the Monongahela National Forest are closed due to a disease known as White Nose Syndrome that is killing bats. On June 5, 2015, I contacted WV a wildlife biologist and forwarded him a photograph depicting the bat in the photographs with the two suspects. The wildlife biologist believes that bat depicted in the photograph is a tricolored bat (formerly known

as Eastern pipistrelles), which is a bat that was affected by the disease and one that the US Fish and Wildlife Service is considering listing as a threatened or endangered species.

10. Vandalism Site Determined to be on National Forest Lands: On June 17, 2015, Forest Service Geologist Will Wilson provided me with a map depicting the location of the vandalism. The site was confirmed to be on Monongahela National Forest land.

11. 2<sup>nd</sup> Bowden Cave Clean-up: On June 27, 2015, members of the Mon Grotto Geo Corps and Philly Grotto visited the Bowden Cave to clean up and remove the graffiti. During this visit, members located additional graffiti in the form of drawings and a name "Dustin". It is not known if this is related to the other graffiti previously located.

12. Agent Contacts Codey FOSTER: On July 15, 2015, I spoke to Codey FOSTER over the phone. I advised FOSTER that the investigation revealed that he and Dusten GILL had painted their names on the wall at Bowden Cave and had visited the cave during the bat hibernation. I told FOSTER that I would like to interview both him and GILL, but that neither were under any obligation to do so. FOSTER asked me how I knew they did it and I explained that I had observed photographs from FOSTER'S Facebook page. FOSTER stated, "we did wrong and I want to cooperate." FOSTER asked me what kind of trouble they were in. I told im that they had damaged government property and a "significant cave". FOSTER stated, "That was the first cave we were in. That was stupid and I don't do that anymore." FOSTER explained that he and GILL were now very serious cavers and respected the caves.

13. Damage Assessment for Damage to Bowden Cave: On August 05, 2015, I received an email from a Forest Service Geologist with an estimate of the costs associated with the clean-up of the damages (graffiti) of Bowden Cave. The total estimate is \$3,192.66.

14. Facebook: Facebook owns and operates a free-access social networking website that can be accessed at <http://www.facebook.com>. Facebook allows its users to establish accounts with Facebook, and users can then use their accounts to share written news, photographs, videos, and other information with other Facebook users.

15. Facebook asks users to provide basic contact and personal identifying information to Facebook, either during the registration process or thereafter. This information may include the user's full name, birth date and e-mail addresses.

16. Facebook allows users to upload photos and videos, which may include any metadata such as location that the user transmitted when s/he uploaded the photo or video. It also provides users the ability to "tag" (i.e., label) other Facebook users in a photo or video. When a user is tagged in a photo or video, he or she receives a notification of the tag and a link to see the photo or video. For Facebook's purposes, the photos and videos associated with a user's account will include all photos and videos uploaded by that user that have not been deleted, as well as all photos and videos uploaded by any user that have that user tagged in them.

17. Facebook also retains Internet Protocol ("IP") logs for a given user ID or IP address. These logs may contain information about the actions taken by the user ID or IP address on Facebook, including information about the type of action, the date and time of the action, and the user ID and IP address associated with the action. For example, if a user views a Facebook profile, that user's IP log would reflect the fact that the user viewed the profile, and would show when and from what IP address the user did so.

18. Therefore, the computers of Facebook are likely to contain all the material described above, including stored electronic communications.

**INFORMATION TO BE SEARCHED AND THINGS TO BE SEIZED**

19. I anticipate executing this warrant under the Electronic Communications Privacy Act, in particular 18 U.S.C. §§ 2703(a), 2703(b)(1)(A) and 2703(c)(1)(A), by using the warrant to require Facebook to disclose to the government copies of the records and other information (including the content of communications) particularly described in the Search Warrant Application. Upon receipt of the information described in Section I of Attachment B, government-authorized persons will review that information to locate the items described in Section II of Attachment B.

**CONCLUSION**

20. Based on the forgoing, I request that the Court issue the proposed search warrant.

21. This Court has jurisdiction to issue the requested warrant because it is “a court of competent jurisdiction” as defined by 18 U.S.C. § 2711. 18 U.S.C. §§ 2703(a), (b)(1)(A) & (c)(1)(A). Specifically, the Court is “a district court of the United States . . . that – has jurisdiction over the offense being investigated.” 18 U.S.C. § 2711(3)(A)(i).

22. Pursuant to 18 U.S.C. § 2703(g), the presence of a law enforcement officer is not required for the service or execution of this warrant.

Respectfully submitted,



Special Agent Wilmer (Gene) Smithson III  
Special Agent  
USDA Forest Service

Subscribed and sworn to before me on March 15, 2016



UNITED STATES MAGISTRATE JUDGE